No. 10-623

Supreme Court, U.S.
FILED
MAR 03 2011
OFFICE OF THE CLERK

In The
Supreme Court of the United States

JUAN CARLOS ASTELLO,

Petitioner,

vs.

JOHN FAYRAM, Warden,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION

THOMAS J. MILLER
Attorney General of Iowa
KEVIN CMELIK
Assistant Attorney General
THOMAS W. ANDREWS*
Assistant Attorney General
**Counsel of Record*
IOWA DEPARTMENT OF JUSTICE
Hoover Bldg., 2nd Floor
Des Moines, Iowa 50319
(515) 281-3349
tandrews@ag.state.ia.us

Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

I. Whether the district court abused its discretion in summarily dismissing Petitioner's time-barred 2254 action?

II. Whether Petitioner's territorial jurisdiction arguments are procedurally defaulted, fail to present a federal issue, and are of no merit?

III. Whether there is any urgency in addressing Petitioner's *Graham* claim, which is both unexhausted and without merit?

TABLE OF CONTENTS

Page

Counter-Statement of the Questions Presented ... i

Table of Contents ... ii

Table of Authorities ... v

Opinions Below ... 1

Lack of Jurisdiction ... 1

Federal Statutes and Rules Involved ... 2

Statement of the Case ... 2

Reasons for Denying the Writ ... 7

Respondent challenges Petitioner's statements of fact ... 7

I. The district court did not abuse its discretion in summarily dismissing Petitioner's time-barred 2254 action ... 9

1. Supreme Court precedent authorizes summary dismissal ... 9

2. Petitioner's suspension of the writ argument is unsupported and without merit ... 10

3. Petitioner met none of the mandatory criteria established by AEDPA for the issuance of a Certificate of Appealability ... 12

TABLE OF CONTENTS – Continued

Page

II. Petitioner's territorial jurisdiction arguments fail to present a federal issue, are procedurally defaulted, and have no merit 13

1. Petitioner raised no *federal* issue regarding territorial jurisdiction below.... 13

2. Petitioner has failed to rebut the findings of territorial jurisdiction with clear and convincing evidence..... 14

3. Petitioner's jurisdictional arguments fail to acknowledge dual sovereignty 14

4. Petitioner's jurisdictional arguments fail in light of Iowa statutory and decisional law directly on-point 19

5. Petitioner fails to present any new evidence of factual innocence to support an "actual innocence" claim 22

III. There is no urgency in addressing Petitioner's *Graham* claim, which stands as both unexhausted and without merit..... 24

1. Petitioner's *Graham* issue is not properly exhausted and the courts of Iowa stand ready to hear that claim at any time 25

2. A juvenile who had an intent to kill – and who did in fact kill – is not a "non-homicide offender" for purposes of a proportionality challenge under *Graham*..... 29

Conclusion..... 36

TABLE OF CONTENTS – Continued

Page

Supplemental Appendix

District Court Order Denying Certificate of Appealability (Feb. 16, 2010).....App. 1

TABLE OF AUTHORITIES

Page

CASES

Astello v. State, No. 02-2058, 2004 WL 239852 (Iowa Ct. App. Feb. 11, 2004) 1, 2, 20

Baldwin v. Reese, 541 U.S. 27, 124 S. Ct. 1347, 158 L. Ed. 2d 64 (2004) 21

Ex parte Bollman, 4 Cranch 75 (1807) 11

Bonilla v. State, 791 N.W.2d 697 (Iowa 2010) 28, 29

Day v. McDonough, 547 U.S. 198, 126 S. Ct. 1675, 164 L. Ed. 2d 376 (2006) 9

Doe v. Menefee, 391 F.3d 147 (2d Cir. 2004) 23

Duncan v. Walker, 533 U.S. 167, 121 S. Ct. 2120, 150 L. Ed. 2d 251 (2001) 24

Espie v. Birkett, 2010 WL 2994010 (E.D. Mich. July 28, 2010) 33

Estelle v. McGuire, 502 U.S. 62, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991) 22

Felker v. Turpin, 518 U.S. 651, 116 S. Ct. 2333, 135 L. Ed. 2d 827 (1996) 11

Fenske v. Thalacker, 60 F.3d 478 (8th Cir. 1995) 19

Forcey v. State, 2010 WL 2010942 (Tex. App. May 19, 2010) 33

Frey v. Schuetzle, 78 F.3d 359 (8th Cir. 1996) 21, 25

Graham v. Florida, 560 U.S. ___, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010) ..... *passim*

Hohn v. United States, 524 U.S. 236 (1998) 1

TABLE OF AUTHORITIES – Continued

Page

Jackson v. Norris, ___ S.W.3d ___, 2011 WL 478600 (Ark. Feb. 9, 2011) 34

Jensen v. Zavaras, 2010 WL 2825666 (D. Col. July 16, 2010) 33

Keeney v. Tamayo-Reyes, 504 U.S. 1, 112 S. Ct. 1715, 118 L. Ed. 2d 318 (1992) 27

Lonchar v. Thomas, 517 U.S. 314, 116 S. Ct. 1293, 134 L. Ed. 2d 440 (1995) 11

Miller-El v. Cockrell, 537 U.S. 322, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003) 12

Miller v. Marr, 141 F.3d 976 (10th Cir. 1998) .....

Miller v. State of Alabama, ___ So. 3d ___, 2010 WL 3377692 (Ala. Crim. App. Aug. 27, 2010) 33

Missouri v. Hunter, 459 U.S. 359, 103 S. Ct. 673, 74 L. Ed. 2d 535 (1983) 19

Molo v. Johnson, 207 F.3d 773 (5th Cir. 2000) 23

Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 22 L. Ed. 429 (1875) 20

O'Brien v. Skinner, 414 U.S. 524, 94 S. Ct. 740, 38 L. Ed. 2d 702 (1974) 19

O'Sullivan v. Boerckel, 526 U.S. 838, 119 S. Ct. 1728, 144 L. Ed. 2d 1 (1999) 21, 26

People v. Couch, 2011 WL 302864 (Cal. App. 4th Dist. Feb. 1, 2011) 34

People v. Hernandez, 2011 WL 539448 (Cal. App. 2d Dist. Feb. 17, 2011) 34

TABLE OF AUTHORITIES – Continued

Page

People v. Perez, 2011 WL 521319 (Cal. App. 4th Dist. Feb. 15, 2011) 34

Pitts v. Norris, 85 F.3d 348 (8th Cir. 1996) 23

Sawyer v. Whitley, 505 U.S. 333 (1992) 23

Schlup v. Delo, 513 U.S. 298, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995) 22, 23

Sillick v. Ault, 358 F. Supp. 2d 738 (N.D. Iowa 2005) 21

Slack v. McDaniel, 529 U.S. 473, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000) 12

State v. Astello, 602 N.W.2d 190 (Iowa Ct. App. 1999) 1, 2, 3, 16, 19

State v. Bruegger, 773 N.W.2d 862 (Iowa 2009) 27

State v. Castillo-Alvarez, No. 08-868, 2009 WL 2960419 (Iowa Ct. App. Sep. 2, 2009) 17, 18

State v. Mann, 602 N.W.2d 785 (Iowa 1999) 16

State v. Serrato, 772 N.W.2d 16 (Iowa Ct. App. 2009) 19

State v. Serrato, 787 N.W.2d 462 (Iowa 2010) 19

State v. Twyman, 2010 WL 4261921 (Del. Super. Oct. 19, 2010) (unpublished) 33

State v. Wedebrand, 602 N.W.2d 186 (Iowa Ct. App. 1999) 16, 19, 21

Sumner v. Mata, 449 U.S. 539, 101 S. Ct. 764, 66 L. Ed. 2d 722 (1981) 14

TABLE OF AUTHORITIES – Continued

Page

Townsend v. Sain, 372 U.S. 293, 83 S. Ct. 745, 9 L. Ed. 2d 770 (1963) 14

Tison v. Arizona, 481 U.S. 137, 107 S. Ct. 1676, 95 L. Ed. 2d 27 (1987) 32

United States v. Luis Lua, Ramiro Astello, Shawn Wayne Knakmuhs, Benjamin L. Alden, Sarah Ann Kozak, Aurelio J. Ortiz, Jr., et al., no. 3:97-cr-03008-MWB (N.D. Iowa) 16

United States Term Limits, Inc. v. Thornton, 514 U.S. 779, 115 S. Ct. 1842, 131 L. Ed. 2d 881 (1995) 14

Veal v. State, 779 N.W.2d 63 (Iowa 2010) 25, 27, 29

Weeks v. Bowersox, 119 F.3d 1342 (8th Cir. 1997) 27

Welch v. Lund, 616 F.3d 756 (8th Cir. 2010) 21

Woodford v. Visciotti, 537 U.S. 19, 123 S. Ct. 357, 154 L. Ed. 2d 279 (2002) 20

Wyldes v. Hundley, 69 F.3d 247 (8th Cir. 1995) 13

CONSTITUTIONS, STATUTES, AND RULES

U.S. Const. art. I, § 9, cl. 2 11

Pub. L. 104-132, 110 Stat. 1214 (1996) 10

28 U.S.C. § 2241(c)(3) 22

28 U.S.C. § 2244 ..... 2, 10, 23, 27

28 U.S.C. § 2253(c) 2, 12, 13

28 U.S.C. § 2254 ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Sup. Ct. R. 10 ..... 10, 11, 14, 26

Sup. Ct. R. 15(2) 7

Sup. Ct. R. 20.4(a) 11

Rule 4, Rules Governing Section 2254 Cases in the United States District Courts 2, 9

Rule 7, Rules Governing Section 2254 Cases in the United States District Courts 9

Iowa Code § 707.1 ..... 16, 30

Iowa Code § 707(2) 21

Iowa Code § 707.3 ..... 16, 30

Iowa Code § 710 21

Iowa Code § 803.1(1)(a) 18

Iowa Code § 803.1(1)(e) 18

Iowa Code § 803.2 18

OTHER AUTHORITIES

P. Annino, D. Rasmussen, & C. Rice, *Juvenile Life Without Parole for Non-Homicide Offenses: Florida Compared to the Nation* pp. 4-5, n. 8 (Sept. 14, 2009) 31, 32

Brian R. Means, *Fed. Habeas Practitioner Guide, Procedure: Affirmative Defenses*, ¶ 3.00.0 (2007) (WestLaw, CJ-TP database; LEXIS, CRIME library, file name FHABPG) 10

Worthington Daily Globe (Jan. 13, 2011) 18

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

Petitioner's first-degree kidnapping and second-degree murder convictions were affirmed on direct appeal. *State v. Astello*, 602 N.W.2d 190 (Iowa Ct. App. 1999). Petitioner's first state postconviction action was denied and this denial was affirmed on appeal. *Astello v. State*, No. 02-2058, 2004 WL 239852 (Iowa Ct. App. Feb. 11, 2004). Petitioner's second state postconviction action was likewise unsuccessful. *See* Order Dismissing Habeas Petition (Jan. 12, 2010).

This 2254 action was summarily dismissed as time-barred by Senior Judge O'Brien. *Id.* On February 16, 2010, the district court also denied Petitioner's *pro se* motion for a certificate of appealability. (Appx. 1a.)

On April 21, 2010, the Eighth Circuit, after having "carefully reviewed the original file of the district court," also denied issuance of a certificate of appealability. On May 21, 2010, the Court of Appeals denied rehearing.

LACK OF JURISDICTION

This Court generally has jurisdiction to review on petition for a writ of certiorari a denial of an application for a certificate of appealability. *See Hohn v. United States*, 524 U.S. 236 (1998) (2255 action).

However, Petitioner labors under the fatal jurisdictional defect that various of his arguments were not issues upon which Petitioner sought to appeal to the Eighth Circuit.

FEDERAL STATUTES AND RULES INVOLVED

28 U.S.C. § 2244(d)(1)

28 U.S.C. § 2253(c)

28 U.S.C. § 2254

Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts

STATEMENT OF THE CASE

On June 5, 1997, the Petitioner – Juan Carlos "Shadow" Astello – and three others were seen leaving the apartment of the victim – Gregory "Sky" Erickson – by Erickson's roommate. The roommate walked in to find 15-year-old Erickson scared, crying, and physically shaking. Erickson had angered Petitioner and others in the Los Krazy Boyz ("LKB") gang over a disputed drug debt ($1400 in cash and $500 worth of methamphetamine). *See generally State v. Astello*, 602 N.W.2d 190 (Iowa Ct. App. 1999); *Astello v. State*, No. 02-2058, 2004 WL 239852 (Iowa Ct. App. Feb. 11, 2004); Postconviction Ruling (Kossuth County Dist. Ct. Nov. 26, 2002); TT 718, 749-53, 762, 863-64.

~ ~ ~ ~ ~

The next day, on June 6, 1997, Petitioner drove LKB gang leader Luis Lua to pick up a Lorcin .380 caliber semi-automatic handgun. Lua was the source of Petitioner's street name "Shadow," denoting that Petitioner was the constant companion of Lua. *Id.*; TT 669-78, 755-56, 778-79, 866-907.

Later that day, Petitioner, Lua, and others (Shawn Knakmuhs, Ben Alden, Sarah Kozak, Brett Morton and Aurelio Ortiz), now armed with four guns, again went to Erickson's apartment "to take care of Sky." The group occupied Erickson's apartment waiting for his arrival and using methamphetamine as they waited. The group intended to bind Erickson with a roll of duct tape that they brought and toss him in their trunk. Petitioner "was present when his accomplices announced their intention to 'tie Sky up, put him in the trunk' and take him to 'see the man.'" *Astello*, 602 N.W.2d at 197-98; TT 686-89, 789.

Petitioner stayed by the door and window while awaiting Erickson's appearance. Eventually, Petitioner left to shuttle one of the men and three of the guns back to LKB's hometown of Estherville. When Erickson arrived at his apartment after Petitioner's departure, he was confined in a bedroom and beaten by the remaining people at the apartment, with the handgun "dry fired" into his mouth down his throat. Then Erickson was told he was being taken to "see the man," by which was meant Ricardo Castillo – the gang's supplier of marijuana, LSD (lysergic acid diethylamide), "crank" (methamphetamine), and

cocaine – and "would be lucky if the man let him live." *Id.*; TT 790.

~ ~ ~ ~ ~

Later that same day, on the evening of June 6, 1997, Petitioner was seen leaving Lua's residence in Estherville, Iowa – a small community in northern Iowa – with the murder victim, Gregory "Sky" Erickson. *Id.*; TT 870-75.

Also with Petitioner were fellow LKB gang members Ramiro Astello (Petitioner's brother) and gang leader Lua. Lua was still armed with the Lorcin .380 caliber semi-automatic handgun. Before the four men drove away in Petitioner's brother's Mercury Grand Marquis, Lua went to his own car and grabbed several red bandannas (symbols of LKB, which was an offshoot of the nationwide "Bloods" gang). *Id.*; TT 748-51, 865.

Petitioner and his fellow LKB members took Erickson to an isolated park in rural northern Iowa known as Fort Defiance, where they had arranged to meet two other gang members. At the rendezvous spot, Petitioner then directed the other two arrivals to get in the car, and all the men then drove to yet another backwater location in rural Dickinson County, Iowa, known as Swan Lake, with Petitioner riding in the front passenger seat, and Lua and others sitting in the backseat with Erickson, whose head was covered in a pillowcase. The Astello brothers and Lua all spoke to each other in Spanish as they drove. Erickson was ordered to duck down if they passed

another car and when Erickson failed to do so rapidly enough was hit in the back of the head. Lua also held his handgun to Erickson's covered head and yelled "BANG!" causing Erickson to jump. *Id.*

Once at Swan Lake, Erickson tried to resist getting out of the car, then, when he was forced from the vehicle, tried to run away with the pillowcase still over his head. Erickson was immediately captured and his hands were bound behind him with a red bandanna. Another red bandanna was used to gag Erickson's mouth. *Id.*

Petitioner's brother then ran at Erickson and jumped through the air, kicking Erickson in the stomach, doubling him over. Lua then threw Erickson to the ground. *Id.*

Petitioner then ordered the two other gang members (Ryan Wedebrand and Thomas Mann) to join in the beating of Erickson. Petitioner and all the other men then proceeded to repeatedly kick Erickson as he lay sprawled on the ground, gagged and moaning in pain. Eventually, Lua held his handgun to Erickson's head, but Petitioner's brother cautioned: "Not here." *Id.*; TT 892.

Erickson, already bound and gagged, with blood running from his ear, and now no longer able to stand on his own, was then stuffed into a garbage bag and tossed into the trunk by Petitioner and others. The men then drove to Petitioner's former residence, a secluded farmhouse about two miles over the Minnesota border. As they drove, the car was swerved from

side to side, and the brakes repeatedly slammed on, thudding Erickson in the trunk compartment. *Id.*; TT 896-98.

Once at Petitioner's former farmhouse, the men took Erickson down to the dark basement using cigarette lighters to illuminate their path. Erickson was placed up against a basement wall and told not to turn around as the .380 handgun was muffled with a pillow. Then Erickson was shot in the head at close range, execution-style to his brain. *Id.*; TT 903-05, 956.

At the suggestion of Petitioner, the gun was then handed to each man to shoot a bullet into Erickson, but the gun jammed after the second shot despite efforts by Petitioner to "un-jam the gun." The men then left the farmhouse, but plans were made the next day at a party attended by Petitioner for gang members to return and use fire to "clean up" the evidence of the murder. Petitioner was overheard to brag with a smirk on his face about being present when Erickson was executed. *Id.*; TT 1000.

About a week later, on June 14, 1997, a neighbor found Erickson's charred, decomposing corpse with maggot-infested eyes, nose, and mouth. "[A] red bandanna was tied around the mouth and head." Erickson was identified by a forensic dentist using X-ray records. On June 17, 1994, the murder weapon was found in the false ceiling of the Mexico Lindo restaurant (owned by Castillo, the gang's drug supplier), which was located next door to the grocery store

owned by Petitioner's parents. *Id.*; TT 597-98, 619, 821-22.

REASONS FOR DENYING THE WRIT

The decisions below should be sustained because, in large part, Petitioner seeks to have this Court correct the Eighth Circuit and the federal district court for an issue based on *Graham v. Florida*, 560 U.S. ___, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010) never presented to, or preserved in, those tribunals. Petitioner presents no compelling reason for this Court to exercise its discretion in favor of this petition, which, *if* it presents any valid *Graham* issue at all, could be self-corrected by the simple expedient of filing a motion to correct an illegal sentence in the original state trial court.

Respondent challenges Petitioner's statements of fact.

Respondent notes that Petitioner's briefing to this Court, adopting *in toto* claimed facts that first made an appearance in Petitioner's *pro se* Application for a Certificate of Appealability (and appeared again in the Petition for Panel Rehearing filed at the Eighth Circuit), offers a version of factual reality that appears untethered to the actual record created in this case. *See generally* Sup. Ct. R. 15(2) (a brief in opposition should address perceived misstatements of fact made in the petition).

To take just one example, meant to be illustrative of the whole, Petitioner now claims that he did not speak English well. In fact, the *actual* record reveals that it was Petitioner who served as an interpreter for his father during Petitioner's interview by police. Although Petitioner did not take the stand at his trial, as was certainly his right, an audiotape of his interview with investigators Dave Jobes and Paul Soppeland was admitted as an exhibit in his criminal trial, and that audiotape displayed for the jury not only Petitioner's excellent proficiency with the English language, but also his anger. Priscilla Forsyth, Petitioner's trial attorney, testified in the state postconviction action and confirmed that Petitioner served as an interpreter for his parents. PCR Tr. pp. 136, 155, 159. Petitioner also testified in his postconviction action, without the use of an interpreter (though one was available in the courtroom for other witnesses). PCR Tr. 39-112.

Similarly, various of Petitioner's briefed assertions (Pet. p. 2 n.2), such as that he was either an unwilling or unwitting participant in these crimes, or just out of the hospital, or unfamiliar with the area where the murder took place (his former family home), are without support in this record.

I. The district court did not abuse its discretion in summarily dismissing Petitioner's time-barred 2254 action.

1. Supreme Court precedent authorizes summary dismissal.

Petitioner's suggestion that a statute of limitations may not be raised *sua sponte* by a district court is wrong and fails to acknowledge this Court's precedent directly on point. *See, e.g., Day v. McDonough*, 547 U.S. 198, 209, 126 S. Ct. 1675, 1684, 164 L. Ed. 2d 376 (2006) ("[W]e hold that district courts are permitted, but not obliged, to consider, sua sponte, the timeliness of a state prisoner's habeas petition.")

To the extent that any further discussion is necessary, Petitioner incorrectly asserts (Brf. at 8) that a federal district court cannot dismiss a section 2254 habeas action under Rule 4 "without considering the petition on the merits or eliciting an Answer from Respondent." If this be true, it is amazing that no federal court has so held in the 33 years since Rule 4 became effective back in 1977. *See* Rule 4, Rules Governing Section 2254 Cases in the United States District Courts ("If it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition and direct the clerk to notify the petitioner."); Rule 7, Rules Governing Section 2254 Cases in the United States District Courts advisory committee's note ("Most petitions are dismissed either summarily or after a response has been made").

In any event, a "petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." Sup. Ct. R. 10.

2. Petitioner's suspension of the writ argument is unsupported and without merit.

As to Petitioner's "suspension" argument, the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") was signed into law, and became effective, on April 24, 1996. Pub. L. 104-132, 110 Stat. 1214 (1996). The AEDPA amended 28 U.S.C. section 2244 to, for the first time, impose a statute of limitations for federal habeas corpus petitions brought under 28 U.S.C. section 2254, which is now codified at 28 U.S.C. section 2244(d) (1996).

Petitioner does not dispute that the one-year limitations period had run by the time he filed his 2254 action. Unable to sustain the showing required for equitable tolling below, Petitioner now asserts that utilizing the one-year limitations period violates the Suspension Clause.

AEDPA's one-year limitations period has withstood all "constitutional challenges brought under the Suspension Clause. . . ." Brian R. Means, *Fed. Habeas Practitioner Guide, Procedure: Affirmative Defenses,* ¶ 3.00.0 (2007) (WestLaw, CJ-TP database; LEXIS, CRIME library, file name FHABPG) (citations omitted). There is thus no split of authority or recurring

disagreement requiring resolution by this Court, *see* Sup. Ct. R. 10(a), and even if there were, the undeveloped posture of Petitioner's Suspension Clause argument in the courts below makes this case a poor vehicle for taking up such a matter.

In any event, the analysis here is akin to that employed in *Felker v. Turpin*, 518 U.S. 651, 116 S. Ct. 2333, 135 L. Ed. 2d 827 (1996), which concluded that AEDPA's restrictions on second or successive habeas petitions do not violate the Constitution's Suspension Clause. *See generally* U.S. Const. art. I, § 9, cl. 2 (providing that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended."). Without retracing each step in that analytic framework, it suffices to say that this Court has "long recognized that 'the power to award the writ by any of the courts of the United States, must be given by written law. . . .'" *Felker*, 518 U.S. at 664, *quoting Ex parte Bollman*, 4 Cranch 75, 94 (1807); *see also Lonchar v. Thomas*, 517 U.S. 314, 323, 116 S. Ct. 1293, 134 L. Ed. 2d 440 (1995) (judgments about the proper scope of the writ are normally for Congress to make). In addition, nothing about AEDPA's enactment of a statute of limitations applicable in the federal district courts impacts *this* Court's ability to issue the writ when properly petitioned directly in an appropriate case. *See generally* Sup. Ct. R. 20.4(a).

Accordingly, Petitioner's suspension of the writ argument is without merit.

3. Petitioner met none of the mandatory criteria established by AEDPA for the issuance of a Certificate of Appealability.

As displayed by the above discussion, the Petitioner did not meet AEDPA's statutory criteria for issuance of a certificate of appealability. To obtain a certificate of appealability on claims for section 2254, an applicant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Miller-El v. Cockrell*, 537 U.S. 322, 335-36 123 S. Ct. 1029, 1039-40, 154 L. Ed. 2d 931 (2003). The decision by both the district court and the Eighth Circuit to not issue a certificate of appealability does not conflict with any holding of this Court or any other federal circuit court.

Rather, this Court's prior cases reveal that no appeal is warranted "[w]here a plain procedural bar is present and the district court is correct to invoke it to dispose of the case" since "a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petitioner should be allowed to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 1604, 146 L. Ed. 2d 542 (2000).

Petitioner failed to make out any substantial showing of the denial of a federal constitutional right, much less any such denial occasioned by the federal district court's correct conclusion that his habeas

action was time-barred. This petition should be denied. 28 U.S.C. § 2253(c).

II. Petitioner's territorial jurisdiction arguments fail to present a federal issue, are procedurally defaulted, and have no merit.

Petitioner hangs several arguments off of his assertion that Iowa lacked "territorial jurisdiction" to prosecute him. The Warden notes that Petitioner's territorial jurisdiction claim is the only issue as to which Petitioner sought rehearing by the Eighth Circuit, but he has consistently failed to show what *federal* constitutional, statutory, or decisional precedent supports a 2254 action on that basis, or meets either of the mandatory showings set forth in 28 U.S.C. section 2254(d) for matters that have been decided on their merits in the state courts.

1. Petitioner raised no *federal* issue regarding territorial jurisdiction below.

The Petitioner's application for further review filed in his direct appeal invokes *no* federal principle or case as a basis for his territorial jurisdiction challenge, relying solely on state law. If a state prisoner wishes to properly claim that his incarceration violates federal law, "he must say so, not only in federal court, but in state court." *Wyldes v. Hundley*, 69 F.3d 247, 251 (8th Cir. 1995).

2. Petitioner has failed to rebut the findings of territorial jurisdiction with clear and convincing evidence.

To the extent that Petitioner desires to question the state court findings of fact sustaining the determination that Iowa had territorial jurisdiction, he has consistently failed to allege, much less establish, the clear and convincing facts necessary to rebut the presumption of correctness that inheres in the state court findings of fact and credibility assessments below. 28 U.S.C. § 2254(e)(1); *Sumner v. Mata (Mata I)*, 449 U.S. 539, 101 S. Ct. 764, 66 L. Ed. 2d 722 (1981); *Townsend v. Sain*, 372 U.S. 293, 309 n.6, 83 S. Ct. 745, 756, 9 L. Ed. 2d 770 (1963); Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings.").

3. Petitioner's jurisdictional arguments fail to acknowledge dual sovereignty.

In making his arguments, Petitioner largely ignores the concept of dual sovereignty. *Cf. United States Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838, 115 S. Ct. 1842, 1872, 131 L. Ed. 2d 881 (1995) (Kennedy J., concurring) ("Federalism was our Nation's own discovery. The Framers split the atom of sovereignty.").

Given the broad jurisdiction spelled out by Iowa, Minnesota, and the federal government under their respective statutes and decisional law, it stands as something of a mystery how Petitioner could continue

to make the blinkered assertion that Iowa did not have jurisdiction to prosecute under the facts of this case.

Those facts reveal that various LKB gang members were tasked with picking up the murder weapon, its clip, and buying fresh ammunition; then beat and abducted Erickson at gun-point from his apartment in Spencer, Iowa. The gang then zig-zagged through four counties, three in Iowa and one in Minnesota, taking Erickson from Spencer (Clay County) to Estherville, Iowa (Emmet County), to "see the man." The Petitioner and his accomplices then transported a hooded Erickson first to Fort Defiance then to Swan Lake in rural Dickinson County, Iowa. Lua put his handgun to Erickson's head – the same handgun Petitioner helped him pick up earlier in the day – but was stopped short of pulling the trigger right then and there by Petitioner's brother admonishing: "Not here."

As the facts presented above reveal, elements of conspiracy and kidnapping took place in Iowa. And the beating and use of a firearm – with the victim's execution stayed only long enough to go someplace even further off the beaten path – displayed malice aforethought as contemplated by Iowa's murder statute, which malice aforethought the Petitioner and his accomplices transported across the state line to Jackson County, Minnesota, where the murder concluded. Under these facts, a reasonable jury applying Iowa law could easily find, *inter alia*, that the "malice aforethought" element of murder existed in Iowa.

Iowa Code § 707.1 (murder defined); *see also* Iowa Code § 707.3 (second-degree murder); Iowa Uniform Crim. Jury Inst. 707.7, 707.10, 707.13.

~ ~ ~ ~ ~

Nevertheless, Petitioner asserts that the state courts of Iowa lacked jurisdiction over him. By way of background, with one exception discussed below, the adults who conspired in this case were prosecuted and tried (or pled guilty) in federal court. *See United States v. Luis Lua, Ramiro Astello, Shawn Wayne Knakmuhs, Benjamin L. Alden, Sarah Ann Kozak, Aurelio J. Ortiz, Jr., et al.*, no. 3:97-cr-03008-MWB (N.D. Iowa).

And the juveniles – Petitioner, Wedebrand, Mann – were all tried in the Iowa courts. *See State v. Astello*, 602 N.W.2d 190 (Iowa Ct. App. 1999); *State v. Wedebrand*, 602 N.W.2d 186 (Iowa Ct. App. 1999) (first-degree felony murder and first-degree felony kidnapping convictions upheld, upholding prosecution in Iowa against territorial jurisdiction attack); *State v. Mann*, 602 N.W.2d 785 (Iowa 1999) (affirming guilty plea to second-degree murder). Petitioner also offers no explanation for why, if Iowa was not a proper locus for prosecutions, all of the federal prosecutions were conducted in the Northern District of *Iowa*.

An Iowa jury found Petitioner guilty of second-degree murder, first-degree kidnapping, and conspiracy to commit a forcible felony. Petitioner was sentenced to an indeterminate fifty-year term of incarceration for second-degree murder and a life sentence without

the possibility of parole for first-degree kidnapping. Petitioner was tried in the Iowa courts (like the other juvenile gang members) after rejecting a federal plea agreement (calling for 30 years to life under the federal sentencing guidelines) that would have required him to testify against his fellow gang members, including his brother. Petitioner's attorneys explained to him that even "if he obtained a favorable decision in Iowa state court, the state of Minnesota would prosecute him for murder, and no plea offers would be available in state court." PCR Ruling at 12.

The wisdom of this counsel is seen by looking to the case of Ricardo Castillo (a false, assumed name). Two days after the discovery of Erickson's charred body, Police served a search warrant on Castillo looking for the murder weapon hidden in the overhead ceiling of his business and gave Castillo the opportunity to unlock his restaurant rather than have officers kick in the door. Castillo unlocked the restaurant door and that was the last time officers saw him, as he immediately fled from the state to his native Mexico. *See State v. Castillo-Alvarez*, No. 08-868, 2009 WL 2960419 (Iowa Ct. App. Sep. 2, 2009).

Mexican authorities refused to extradite Castillo to the federal system, where he faced the possibility of the death penalty or life in prison without the possibility of parole. Iowa eventually obtained Castillo's return by agreeing to prosecute Castillo for no more than second-degree murder (a Class B felony carrying an indeterminate 50-year sentence), but the

Iowa Court of Appeals – relying on Iowa's speedy trial statute, and over a strong dissent – held that Iowa delayed too long in bringing Castillo to trial and dismissed charges against him. *Id.* Castillo was just tried and convicted in January 2011 in Jackson County, Minnesota, and is now awaiting sentencing in March. *State of Minnesota v. Juan Humberto Castillo-Alvarez*, Jackson County Crim. No. 32-CR-1031 (2011); *see also* Worthington Daily Globe (Jan. 13, 2011) (recounting incriminating testimony from Petitioner's brother), available on-line at http://www.esthervilledailynews.com/page/content.detail/id/512409/murder-trial-continues-man-serving-life-sentence-testifies.html?nav=5003.

Petitioner's arguments to this Court fail to recognize what his attorneys have been telling him all along: Because Petitioner committed various elements of his crimes in both Iowa and Minnesota, the law of both states, as well as the federal government, allow for his prosecution. The common law authority cited by Petitioner has long since been superseded by statutes directly on point. In his prior briefing in the Iowa courts, Petitioner noted that Iowa Code section 803.1 is the relevant provision establishing Iowa state criminal jurisdiction. *See* Application for Further Review in Astello's direct appeal. Iowa Code section 803.1 provides, *inter alia*, that a person is subject to prosecution in Iowa for any offense that a person "commits within or *outside*" Iowa so long as the offense is "committed either wholly or partly" within Iowa. Iowa Code §§ 803.1(1)(a), 803.1(1)(e), 803.2.

4. Petitioner's jurisdictional arguments fail in light of Iowa statutory and decisional law directly on-point.

The Iowa Court of Appeals in this case adopted the territorial jurisdiction analysis set forth in Wedebrand's "companion case." *Astello*, 602 N.W.2d at 194, adopting *in pto State v. Wedebrand*, 602 N.W.2d 186, 189 (Iowa Ct. App. 1999) ("We are unable to reconcile Wedebrand's [territorial jurisdiction] arguments with the plain language of [Iowa Code] section 803.1 and 803.2").

Petitioner's efforts to distinguish away *Wedebrand*'s territorial jurisdiction analysis by relying (Pet. p. 12-15) on the unpublished state case of *State v. Serrato*, 772 N.W.2d 16 (Iowa Ct. App. 2009), is unavailing as the Iowa Supreme Court overruled that decision on July 9, 2010, a month before Petitioner filed his petition for a writ of certiorari in this Court. *See State v. Serrato*, 787 N.W.2d 462 (Iowa 2010).

It is elementary that state law defines the elements of state-law crimes. *Fenske v. Thalacker*, 60 F.3d 478, 480 (8th Cir. 1995). Consequently, it is the task of the state courts to determine and define the scope of state statutory provisions. *Id.* As this Court has held, it is not the function of federal courts "to construe a state statute contrary to the construction given it by the highest court of a State." *O'Brien v. Skinner*, 414 U.S. 524, 531, 94 S. Ct. 740, 744, 38 L. Ed. 2d 702 (1974); *see also Missouri v. Hunter*, 459 U.S. 359, 103 S. Ct. 673, 74 L. Ed. 2d 535 (1983)

("We are bound to accept the Missouri court's construction of that State's statutes."); *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590, 22 L. Ed. 429 (1875) (same).

Given the record in this case, "at the very least . . . the state court's . . . assessment was not 'unreasonable.'" *Woodford v. Visciotti*, 537 U.S. 19, 123 S. Ct. 357, 361, 154 L. Ed. 2d 279 (2002) (per curiam). Where a State court's assessment of a legal issue is not objectively unreasonable, "[h]abeas relief is . . . not permissible under § 2254(d)." *Id.*

~ ~ ~ ~ ~

Undeterred by Iowa's enactment of express statutory provisions allowing for his prosecution under the facts of this case, Petitioner brushes past the actual facts of this case to cobble together a syllogism that appears to go something like this:

- Iowa purportedly prosecuted Petitioner under the wrong Iowa statute.
- Doing so deprived Iowa of territorial jurisdiction over Petitioner.
- Thus, Petitioner should be deemed to be "actually innocent."

This proposed syllogism equating a claimed lack of territorial jurisdiction with actual innocence is both fundamentally flawed as an analytical matter and procedurally defaulted. *See Astello v. State*, No. 02-2058, 2004 WL 239852 (Iowa Ct. App. Feb. 11, 2004).

In addition to being wrong in his reading of Iowa law relating to territorial jurisdiction (*see Wedebrand*, 602 N.W.2d at 189), Petitioner's challenge (Pet. p. 16) to the use of Iowa Code sections 710 and 707(2)(1) and (2), has not been properly pled or exhausted by being presented and litigated in a full and complete round of litigation.

The state statutory provisions now invoked by Petitioner were not raised or "properly exhausted" in Petitioner's Application for Further Review in either his direct or postconviction appeal, and thus claims premised on the operation of these state statutes both fail to state a cognizable federal claim and are procedurally defaulted in this forum. *See, e.g., Baldwin v. Reese*, 541 U.S. 27, 29, 124 S. Ct. 1347, 158 L. Ed. 2d 64 (2004); *O'Sullivan v. Boerckel*, 526 U.S. 838, 845, 119 S. Ct. 1728, 1731-32, 144 L. Ed. 2d 1 (1999); *see also Welch v. Lund*, 616 F.3d 756 (8th Cir. 2010) (proper exhaustion under Iowa practice requires a prisoner to seek further review of an issue in the Iowa Supreme Court); *Sillick v. Ault*, 358 F. Supp. 2d 738 (N.D. Iowa 2005) (same); *see generally Frey v. Schuetzle*, 78 F.3d 359, 361 (8th Cir. 1996) (reversing grant of habeas corpus by district court where basis for granting relief was not alleged in petition).

Even if Petitioner's challenges to the various Iowa statutes that he now discusses in his briefing to this Court had been properly exhausted in the state courts, Petitioner's pervasive reliance in all three divisions of his briefing to this Court on *state* law precedent and *state* law arguments is misplaced. It is

for the prosecutors and courts of Iowa to determine what Iowa statutes to use to bring a case to trial. The Iowa courts are the final arbiter of Iowa law.

As this Court has emphasized, "[I]t is not the province of a federal habeas court to reexamine state court determinations on state law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." *Estelle v. McGuire*, 502 U.S. 62, 68, 112 S. Ct. 475, 480, 116 L. Ed. 2d 385 (1991). Federal courts conducting 2254 habeas proceedings are not charged with the correction of perceived errors in state law, procedure, or practice. 28 U.S.C. § 2241(c)(3), 2254(a) (federal habeas jurisdiction limited to violations of federal Constitution, laws and treaties).

5. Petitioner fails to present any new evidence of factual innocence to support an "actual innocence" claim.

Petitioner's arguments also miscomprehend what a gateway "actual innocence" claim involves. Petitioner argues that Iowa lacked territorial jurisdiction over him. He is wrong, but more particularly, such a claim presents an issue of *legal* innocence, not *actual* innocence.

As its name telegraphs, the actual innocence exception is concerned with situations that may have "resulted in the conviction of one who was *actually innocent*." *Schlup v. Delo*, 513 U.S. 298, 322, 115

S. Ct. 851, 130 L. Ed. 2d 808 (1995). "[T]o be credible, [a claim of actual innocence] requires petitioner to support his allegations of constitutional error with new reliable evidence that was not presented at trial." *Id.* at 324. Examples of evidence that might establish factual innocence include credible declarations of guilt by another, *Sawyer v. Whitley*, 505 U.S. 333, 340 (1992); trustworthy eyewitness accounts, *Schlup*, 513 U.S. at 298; and exculpatory scientific evidence, *Pitts v. Norris*, 85 F.3d 348, 351 (8th Cir. 1996). But Petitioner presents no compelling claim of actual innocence warranting addressing the question he raises. *See, e.g., Molo v. Johnson*, 207 F.3d 773, 775 (5th Cir. 2000) (declining to determine whether actual innocence equitably tolled the limitations period because Molo failed to make the requisite legal showing).

This Court has not yet stated whether the absence of an actual innocence exception to AEDPA's limitations period would render the statute an unconstitutional suspension of the Writ. *But see Doe v. Menefee*, 391 F.3d 147, 161 (2d Cir. 2004) ("[W]e see no reason not to apply the *Schlup* [*v. Delo*] standard in the tolling context."). Congress' decision to exclude an actual-innocence exception from 28 U.S.C. § 2244(d), but to include an actual-innocence exception in § 2244(b)(2)(B)(ii) (for successive petitions), presents a compelling argument that Congress did not intend actual innocence to have application to the statutory period of limitations. Where Congress includes particular language in one section of a statute but omits it in another section of the same enactment, it is

generally presumed that Congress acted intentionally and purposely. *Duncan v. Walker*, 533 U.S. 167, 173, 121 S. Ct. 2120, 150 L. Ed. 2d 251 (2001).

But any such issue is moot in this case because Petitioner has no qualifying gateway actual innocence claim to present. He does not claim actual – that is, factual – innocence, he claims that *all* the elements of this murder took place in Minnesota to the exclusion of any element having taken place in Iowa, or (more recently) that Iowa somehow used the wrong statutory provision to charge him – assertions unsupported by this record or Iowa law, repeatedly rejected by prior courts, and as to which he has no new evidence to present.

III. There is no urgency in addressing Petitioner's *Graham* claim, which stands as both unexhausted and without merit.

Petitioner now seeks to raise for the first time a claim based on this Court's recent decision in *Graham*, a case that applied only to juvenile offenders who had been sentenced to life without parole solely for nonhomicide offenses. *Graham v. Florida*, 560 U.S. ___, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010). The decision in *Graham* was not handed down until after the proceedings in the Iowa courts, the federal district court, and the Eighth Circuit had been decided (the order denying panel rehearing issued three days after *Graham*).

As discussed below, Petitioner could have – and should have – returned (indeed, still can return) to the Iowa courts to avail himself of whatever benefit there is to be derived from *Graham* as applied to the facts of his case. Under Iowa practice, a motion to correct an illegal sentence is allowed at any time and is a post-trial proceeding conducted in the original criminal trial court, not a collateral attack conducted in a postconviction proceeding. *Veal v. State*, 779 N.W.2d 63, 65 (Iowa 2010).

Instead, Petitioner improperly seeks to burden this Court with the role of a court of first impression as to claims, issues, and arguments never before presented by Petitioner to any state or federal court for development.

1. Petitioner's *Graham* issue is not properly exhausted and the courts of Iowa stand ready to hear that claim at any time.

The *Graham* argument presented to this Court by Petitioner ignores first principles of appellate practice and this essential fact: No argument based on cruel and unusual punishment or the *Graham* decision was presented to the federal courts below. It would have been error for the federal district court to have granted relief on a basis not pled or urged in the Petitioner's 2254 petition. *See, e.g., Frey v. Schuetzle*, 78 F.3d 359, 361 (8th Cir. 1996) (reversing grant of habeas corpus by district court where basis for granting relief

was not alleged in petition). Similarly, there was no cruel and unusual punishment claim to "review" on appeal to the Eighth Circuit.

Thus, Petitioner's invitation to this Court that it take up his claim for the first time presents the very antithesis of proper exhaustion. With all prior courts having properly applied settled precedent in good faith to the issues that Petitioner *did* raise, Petitioner now seeks to bypass state court exhaustion as to his *Graham* claim. This he may not do. And he offers no principled reason why this Court should exercise its discretion to end-run normal record development and invoke its supervisory powers in a context where all courts throughout the country are complying with the *Graham* holding. *See generally* Sup. Ct. R. 10(a)-(c).

If Petitioner truly desires to pursue this previously unexhausted claim in a federal habeas corpus proceeding, this matter should first be raised in Iowa's court system and pursued through a full and complete round of litigation to final resolution. 28 U.S.C. § 2254(b)(1)(A) (Habeas "shall not be granted unless . . . applicant has exhausted the remedies available in the courts of the State"); *O'Sullivan v. Boerckel*, 526 U.S. 838, 845, 119 S. Ct. 1728, 1731-32, 144 L. Ed. 2d 1 (1999) ("[S]tate prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process."). This "allows the states to correct any possible constitutional violations without unnecessary intrusions by the federal courts and allows the state courts to

create a factual record should the matter proceed to federal court. . . ." *Weeks v. Bowersox*, 119 F.3d 1342, 1349-50 (8th Cir. 1997) (en banc); *but see* 28 U.S.C. § 2244(d)(1)(C) (one-year to file a 2254 action begins running on "the date on which the constitutional right asserted was initially recognized by the Supreme Court").

Strong public policy and institutional concerns for comity and federalism dictate that such matters should be decided in the first instance by an Iowa court because such a determination may forestall the need for any federal habeas corpus review at all. *See, e.g., Keeney v. Tamayo-Reyes*, 504 U.S. 1, 10, 112 S. Ct. 1715, 1720, 118 L. Ed. 2d 318 (1992) ("[P]urpose of exhaustion is . . . to channel claims into an appropriate forum, where . . . unfounded litigation [may be] obviated before resort to the federal court."); *Weeks v. Bowersox*, 119 F.3d 1342, 1349-50 (8th Cir. 1997) (en banc) (same).

Petitioner's briefing (at 10) acknowledges that his *Graham* claim may be raised and presented to the courts of Iowa *at any time* under Iowa practice, which allows an illegal sentence claim based on cruel and unusual punishment to be raised at any time, yet he seeks to put on this Court's finite docket an issue never presented to the state courts. *See generally Veal v. State*, 779 N.W.2d 63 (Iowa 2010); *State v. Bruegger*, 773 N.W.2d 862 (Iowa 2009). Thus, Petitioner holds the keys to the courthouse door in his own hands insofar as the airing of a *Graham* claim is concerned in the Iowa courts.

The courts of Iowa need no additional incentive from this Court to enforce the mandate of *Graham*, as *Graham* has already been implemented in cases presented to the Iowa Courts invoking *Graham*'s categorical rule that juveniles may not be sentenced to life without parole for nonhomicide offenses. *See, e.g., Bonilla v. State,* 791 N.W.2d 697 (Iowa 2010) (ordering that Bonilla's sentence in a nonhomicide context be converted to life *with* the possibility of parole).

Similarly, the Iowa legislature needs no additional incentive to take seriously this Court's ruling in *Graham*. Proposed legislation is at this moment being studied in both chambers of the Iowa General Assembly that is intended to implement the letter and spirit of the holding in *Graham* going forward. *See* SSB 2058 & HSB 44, *available at* http://www.legis.state.ia.us/aspx/Cool-ICE/DisplayBills.htm.

"A petition for a writ of certiorari will be granted only for compelling reasons." Sup. Ct. R. 10. There is certainly no urgency at issue in this case that requires this Court to reach out for a case that the courts of Iowa stand ready to hear, if only asked to do so. Even if Petitioner were, *arguendo*, to be resentenced, he could not reasonably expect release from prison for quite some time. Leaving aside his life sentence for first-degree kidnapping, Petitioner is also serving a 50-year sentence for his second-degree murder conviction (a Class B felony under Iowa law). There is plenty of time for Petitioner to avail himself of the normal avenues for presenting his claim.

Surely this Court has more pressing business. Accordingly, Petitioner's claim based on *Graham* should first be presented to the courts of Iowa, which allow claims that a sentence is violative of cruel and unusual punishment to be raised at any time and have been implementing this Court's holding in *Graham*. *See Bonilla*, 791 N.W.2d at 699 (ordering sentence converted to life with the possibility of parole); *cf. Veal*, 779 N.W.2d at 64.

2. A juvenile who had an intent to kill – and who did in fact kill – is not a "non-homicide offender" for purposes of a proportionality challenge under *Graham*.

In *Graham* this Court found, in a closely divided and narrowly constructed holding, that the Constitution categorically forbids sentencing a juvenile offender to life in prison without parole for a nonhomicide crime.

The word "nonhomicide" is a term of art as used throughout the majority opinion in *Graham*, which held that, where a juvenile is convicted of only a nonhomicide offense, a life-without-parole sentence will not survive a categorical proportionality challenge. *Graham*, 130 S. Ct. at 2027.

Petitioner is not eligible for relief under the express holding of *Graham* because his case also involves a contemporaneous conviction and sentencing for a "homicide" offense. Specifically, Petitioner was

convicted of the homicide offense of second-degree *murder*, along with the nonhomicide offenses of first-degree kidnapping and conspiracy to commit a forcible felony. Petitioner was sentenced to an indeterminate fifty-year term of incarceration for the second-degree murder conviction and a life sentence without the possibility of parole for the first-degree kidnapping conviction. Under Chapter 707 of the Iowa Code, entitled "Homicide and Related Crimes," the offense of murder is defined as follows: "A person who kills another person with malice aforethought either express or implied commits murder." Iowa Code § 707.1. Second-degree murder is a Class B felony offense under Iowa law. Iowa Code § 707.3.

Under *Graham*, second-degree murder constitutes a "homicide offense," which *Graham* distinguishes from situations involving "defendants who do not kill, intend to kill, or foresee that life will be taken. . . ." *Graham*, 130 S. Ct. at 2027. Under the analysis set out in *Graham* itself, because Petitioner was convicted and sentenced to a "homicide offense" of second-degree murder at the same time that he was convicted and sentenced to life imprisonment for a "nonhomicide offense" of kidnapping, the narrow categorical rationale of *Graham* does not apply to his sentence of life without parole.

In analyzing the constitutionality of Graham's sentence, the Court determined that "when compared to an adult murderer, a juvenile offender *who did not kill or intend to kill* has a twice diminished moral culpability" and thus cannot be subjected to "the

second most severe penalty permitted by law." *Graham*, 130 S. Ct. at 2028 (emphasis supplied and citations and quotations omitted). Thus, a juvenile who kills or intends to kill cannot be said to have "a twice diminished moral culpability."

This conclusion is buttressed by the fact that in its analysis, the Court in *Graham* suggested that attempted homicide likewise qualified as a homicide crime. Stated differently, an offense involving the "intent to kill" is a "homicide" offense rather than a "nonhomicide crime." *Graham*, 130 S. Ct. at 2028, 2033 (discussing the seven juvenile offenders in Israel serving life sentences for either murder or attempted murder) (citations omitted).

In addition, in *Graham*, the Court relied on an academic study to establish the number of defendants convicted of "nonhomicide offenses" nationwide. In that study, offenses such as attempted murder were recognized as, and treated as, a "homicide offense." *See* P. Annino, D. Rasmussen, & C. Rice, *Juvenile Life Without Parole for Non-Homicide Offenses: Florida Compared to the Nation* pp. 4-5, n.8 (Sept. 14, 2009), *available at* http://www.law.fsu.edu/faculty/profiles/annino/Report_JuvenileLifeSentence_072009.pdf. In fact, the definition section of that study specifically states:

> "[N]on-homicide" is any criminal conviction where the juvenile is not convicted of any type or degree of homicide. "Non-homicide" does not include any convictions for attempted homicides or any convictions for felony murder, where the juvenile did not kill

> anyone but was convicted as an accomplice to a murder. *Individuals convicted of* attempted homicide or *felony murder were defined as homicide offenders.*

Id. at 4-5 (emphasis added; footnote omitted).

In this regard, the United States Supreme Court has previously recognized that a reckless indifference to human life may make a defendant every bit as morally culpable as a defendant affirmatively harboring an intent to kill:

> some nonintentional murderers may be among the most dangerous and inhumane of all – the person who tortures another not caring whether the victim lives or dies, or the robber who shoots someone in the course of the robbery, utterly indifferent to the fact that the desire to rob may have the unintended consequence of killing the victim as well as taking the victim's property. This reckless indifference to the value of human life may be every bit as shocking to the moral sense as an "intent to kill." Indeed it is for this very reason that the common law and modern criminal codes alike have classified behavior such as occurred in this case along with intentional murders.

Tison v. Arizona, 481 U.S. 137, 157, 107 S. Ct. 1676, 95 L. Ed. 2d 27 (1987). "[T]he possibility of bloodshed is inherent in the commission of any violent felony and this possibility is generally foreseeable and foreseen; it is one of the principal reasons that felons arm themselves." *Id.* 481 U.S. at 151.

Petitioner fails to cite any post-*Graham* case that would support his argument that the holding in that case was intended to benefit a defendant in his position. The trend of the courts has been to limit *Graham* to the precise context addressed in *Graham*. *See, e.g., State v. Twyman*, 2010 WL 4261921 (Del. Super. Oct. 19, 2010) (unpublished) (attempted murder is a homicide – rather than nonhomicide – offense under *Graham*); *Miller v. State of Alabama*, ___ So. 3d ___, 2010 WL 3377692 (Ala. Crim. App. Aug. 27, 2010) (*Graham* did not prohibit a life sentence without possibility of parole against defendant who was 14 years of age at time of offense, where charge was murder made capital because it was committed in the course of arson); *Jensen v. Zavaras*, 2010 WL 2825666 (D. Col. July 16, 2010) (habeas corpus relief not proper on claims that *Graham* prohibited life sentence without possibility of parole against juvenile, based on claim that although convicted of first-degree murder, his criminal conduct was limited as a complicitor who did not cause the death of the victim: "[t]here is nothing in the majority opinions [in *Graham*] that suggests that the justices agreeing to it would make the distinction between the actions ultimately causing death and the accomplice's contribution to the crime that the petitioner suggests."); *Espie v. Birkett*, 2010 WL 2994010, 15 n.5 (E.D. Mich. July 28, 2010) (noting *Graham* placed no Eighth Amendment limits on prison terms resulting from homicide convictions); *Forcey v. State of Texas*, 2010 WL 2010942 (Tex. App. May 19, 2010) (acknowledging *Graham* and finding no Constitutional violation

against sentence of life without parole against juvenile convicted of murder committed in course of robbery), petition for discretionary review granted, (Tex. Oct. 6. 2010); *Jackson v. Norris*, ___ S.W.3d ___, 2011 WL 478600 (Ark. Feb. 9, 2011) (rejecting *Graham*'s applicability to a juvenile non-shooter convicted on a felony murder theory because "[t]he Court's holdings in *Roper* and *Graham* are very narrowly tailored to death-penalty cases involving a juvenile and life-imprisonment-without-parole cases for nonhomicide offenses involving a juvenile."); *People v. Perez*, 2011 WL 521319, *4-6 (Cal. App. 4th Dist. Feb. 15, 2011) (finding *Graham* does not prohibit life sentence for non-shooter juvenile convicted of felony murder as an active participant, but providing relief on state law grounds); *People v. Hernandez*, 2011 WL 539448 (Cal. App. 2d Dist. Feb. 17, 2011) (finding *Graham* inapplicable to juvenile convicted of felony murder as a "major participant" in underlying felonies because "[t]his was a 'homicide offense'; and *Graham* is inapplicable."); *People v. Couch*, 2011 WL 302864, *10 (Cal. App. 4th Dist. Feb. 1, 2011) (rejecting *Graham* as applicable to juvenile convicted of felony murder who participated in underlying carjacking and discussing that Supreme Court has permitted death sentence for participation in such felonies).

The decision in *Graham*, its language, its reasoning, and its analytic underpinnings, all combine to establish that the Eighth Amendment does not prohibit a sentence of life without parole in a context

where a juvenile is simultaneously convicted of and sentenced for a homicide offense.

Because Petitioner is among that subset of defendants who was sentenced for a "homicide crime" at the same time that he was sentenced to life imprisonment for kidnapping, his life sentence without parole does not violate the Eighth Amendment:

> Juvenile offenders who commit both homicide and nonhomicide crimes present a different situation for a sentencing judge than juvenile offenders who committed no homicide. It is difficult to say that a defendant who receives a life sentence on a nonhomicide offense but who was at the same time convicted of homicide is not in some sense being punished for the homicide when the judge makes the sentencing determination. *The instant case concerns only those juvenile offenders sentenced to life without parole solely for a nonhomicide offense.*

130 S. Ct. at 2023 (emphasis added).

Therefore, pursuant to *Graham* itself, where one offense is a homicide offense, there is no Eighth Amendment prohibition to sentencing a juvenile to life imprisonment without the possibility of parole for a nonhomicide offense at the same time as the homicide sentencing. Accordingly, Petitioner is not a "nonhomicide offender" for purposes of a proportionality challenge under *Graham* as to his mandatory life sentence without parole for first-degree kidnapping,

such that this claim is both unexhausted and without merit.

CONCLUSION

For the reasons set forth above, this Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,

THOMAS J. MILLER
Attorney General of Iowa
KEVIN CMELIK
Assistant Attorney General
THOMAS W. ANDREWS*
Assistant Attorney General
**Counsel of Record*

Counsel for Respondent

APPENDIX TABLE OF CONTENTS

Page

Order of the District Court Denying a Certificate of Appealability (Feb. 16, 2010) ..... App. 1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION
No. 09-CV-40S2-DEO

JUAN CARLOS ASTELLO,
Plaintiff,

v. ORDER

JOHN FAYRAM, Warden,
Defendant.

This matter is before the Court on Plaintiff Juan Carlos Astello's pro se motion for a certificate of appealability (Docket No.7) and the Notice of Appeal (Docket No.8). Astello appeals from the Preliminary Review Order (Docket No. 4) and Judgment (Docket No.6) denying his petition for a writ of habeas corpus under 28 U.S.C. § 2254 (Docket Nos. 1-1, 5). Federal Rule of Appellate Procedure 24 governs Astello's ability to proceed in forma pauperis in this appeal.

However, before Astello may appeal the denial of his § 2254 Petition, a Certificate of Appealability (COA) must issue. Pursuant to the Anti terrorism and Effective Death Penalty Act of 1996, Pub.L. No. 104-132, 110 Stat. 1214 (AEDPA), the right to appeal the denial of a § 2254 motion is governed by the COA requirements of 28 U.S.C. § 2253(c). Section 2253(c) provides:

> (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –

> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
>
> (B) the final order in a proceeding under section 2255.
>
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
>
> (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 U.S.C. § 2253(c). The showing required to satisfy § 2253(c) is somewhat more complicated where, as here, the district court dismisses the petition based on procedural grounds:

> When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

Slack v. McDaniel, 529 U.S. 473, 484 (2000).

The issues raised in Astello's § 2254 Petition were carefully considered. However, the Petition was summarily dismissed on the basis of untimeliness:

> In sum, Astello did not file his § 2254 petition within the one-year period of limitation. Astello had until February 21, 2001, to file the instant petition. However, Astello did not file his § 2254 petition until June 23, 2009. Even excluding the time during which his two state PCR applications remained pending, Astello's § 2254 petition is still 1,425 days late.

Docket No. 4 at 9-10. In his Petition, Astello did not attribute the delay in filing his federal habeas petition to any state-created impediment, but instead asserted that he was never informed by any of his several attorneys of the 1-year limitations period imposed by 28 U.S.C. § 2244(d). Docket No. 1-1 at 7, 18, 22. Finding this lack of understanding concerning the operation of the statute of limitations did not amount to an extraordinary circumstance beyond his control, this Court concluded equitable tolling could not be applied to excuse Astello's failure to file his Petition within the 1-year limitations period. Docket No.4 at 8-9.

The untimeliness of Astello's Petition is clear, and he has failed to make a substantial showing that reasonable jurists would differ as to this Court's basis for dismissal, or that the Petition is otherwise entitled to further review. See *Slack*, 529 U.S. at 484 ("Where a plain procedural bar is present and the

district court is correct to invoke it to dispose of the case, a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petitioner should be allowed to proceed further. In such a circumstance, no appeal would be warranted."). Accordingly, Astello is not entitled to a COA. The Clerk of the Court is directed to forward this Order, along with the file of this Court's proceedings, to the Eighth Circuit Court of Appeals in accordance with Fed. R. App. P. 22 (b)(1) .

IT IS SO ORDERED this 16th day of February, 2010.

Donald E. O'Brien, Senior Judge
United States District Court
Northern District of Iowa